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No. 83-1215

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF SOUTH CAROLINA, ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that the Secretary of Agriculture's decision to impose a 50-cent per hundredweight deduction on the proceeds of all commercially marketed milk was consistent with the statutory policies underlying 7 U.S.C. 1446(d).

2. Whether the court of appeals applied the proper standard of judicial review under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, to the Secretary's decision to include a deduction as part of the milk price support program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-66a) is reported at 717 F.2d 874. The opinion of the district court (Pet. App. 71a-306a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1983. A petition for rehearing was denied on October 25, 1983 (Pet. App. 312a-314a). The petition for a writ of certiorari was filed on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In order "to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity" for future

needs, Congress authorized the Secretary of Agriculture to support the price of milk. Section 201(c) of the Agricultural Act of 1949, 7 U.S.C. 1446(c). Instead of subsidizing milk producers directly, the Secretary provides price support by having the Commodity Credit Corporation (CCC)—a corporate entity within the Department of Agriculture—purchase an unlimited quantity of milk products at an announced price.[1] Since producers are assured of having the CCC as a buyer and of receiving from the CCC a set price for their products, the Secretary's price support program effectively sets the floor for the price of milk.

In recent years, one of the consequences of the guaranteed market created by the milk price support program has been that domestic milk production has greatly exceeded consumer demand (Pet. App. 10a). In the past two years, the Secretary has purchased the equivalent of ten percent of all milk produced in the United States (*ibid.*). With no demand for these products, the federal government has been required to store massive amounts of surplus milk products at a cost of approximately $50 million per year. In 1982 alone, the government spent about $2.3 billion on the milk price support program (*id.* at 10a-11a).

Congress responded to the problem of massive milk overproduction and its increasing cost to the government by including in the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763 *et seq.*, three amendments to the dairy price support statute (hereinafter referred to as the 1982 dairy amendments). Congress established a minimum price support level for milk; it authorized the Secretary to impose a 50-cent per hundredweight deduction

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[1]The CCC actually purchases milk products such as butter, cheese and nonfat dry milk, but the prices for these products indirectly create a floor for the price of milk itself and directly support the price of the milk products (Pet. App. 10a).

on proceeds of all milk marketed commercially during the period October 1, 1982 to September 30, 1985; and it authorized the Secretary to impose a second 50-cent deduction, which would be refundable to producers who reduced their commercial marketings, for the period April 1, 1983 to September 30, 1985. 7 U.S.C. 1446(d). The Secretary could institute the latter two provisions, however, only if he estimated that federal surplus milk product purchases would exceed specified amounts. 7 U.S.C. 1446(d)(2) and (3).

In September 1982, the Secretary projected that government milk purchases would be more than twice the minimum level set by Congress for authorization of the first 50-cent deduction, and accordingly he decided to exercise his authority to implement fully the deduction program (Pet. App. 14a-15a). This decision was announced as part of the Secretary's "notice of determination" to set the prior support level at $13.10 for the 1983 fiscal year. In November 1982, the Secretary adopted an additional rule requiring that the 50-cent deduction collected in sales by milk producers be remitted to the CCC. 47 Fed. Reg. 53831 (1982).

2. Petitioners brought suit in the United States District Court for the District of South Carolina, alleging that the Secretary's action violated the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, and was unconstitutional. In January 1983, the district court preliminarily enjoined the deduction program, primarily because, in the court's view, the Secretary had failed to comply with the notice and comment rulemaking provisions of the APA, 5 U.S.C. 553 (Pet. App. 15a-17a).

In response to the court's order, the Secretary issued a separate notice of his intention to adopt the 50-cent per hundredweight deduction, 48 Fed. Reg. 3764 (1983), and requested additional comments on the proposal. Numerous comments were received (Pet. App. 18a nn. 15 & 16). After

considering all of the comments in light of the milk production situation, the Secretary again decided to institute the deduction program beginning in April 1983 (*id.* at 17a-18a). The Secretary explained that the CCC would make milk product purchases greatly in excess of the five billion pounds of milk equivalent that Congress had set as the trigger for adopting the 50-cent deduction. 7 U.S.C. 1446(d)(1)(C)(2). With regard to the need for the deduction, the Secretary stated that "[f]ailure to implement any deduction would result in a continuation of the present situation in which milk production and price support program costs are unacceptably high." 48 Fed. Reg. 11254 (1983).[2]

3. Petitioners returned to the district court that previously had enjoined the Secretary's first deduction program and moved for a preliminary injunction against implementation of the renewed determination to adopt the 50-cent deduction.[3] After a hearing, the district court issued a preliminary injunction (Pet. App. 67a-306a). The court limited its analysis solely to nonconstitutional issues. It held that the Secretary erred by focusing on the statutory requirements in the Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, 96 Stat. 763 *et seq.*, instead of the broader price support concerns contained in the general provisions of the Agricultural Act of 1949, 7 U.S.C. 1421 *et*

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[2]The Secretary pointed out that he had considered all of the comments received and had responded to the comments that were more frequently voiced. He rejected the need to regionalize the deduction program because producers nationwide benefit from the program and thus all should "help offset the cost of the program." 48 Fed. Reg. 11254 (1983). The Secretary also acknowledged that the deduction would hurt some producers more than others, but noted that the price support program "does not guarantee a profit to every dairy farmer" (*ibid.*).

[3]The district court initially stayed implementation of the deduction program, but the stay was vacated by the court of appeals (Pet. App. 307a-308a), and the deductions went into effect in April 1983, as scheduled.

seq. (Pet. App. 147a-214a). Second, the court held that the Secretary's decision to proceed with the deduction was arbitrary and capricious, because he failed to respond adequately to the comments he had received or to consider all factors relevant to a fair decision. In particular, the court concluded that the Secretary failed to discuss fully the impact of the deduction on dairy farmers and those parts of the economy dependent on dairy farmers and failed to consider the regional impact of the deduction program (*id.* at 214a-285a).

4. The court of appeals reversed (Pet. App. 1a-66a). The court of appeals first found that the 1982 dairy amendments were intended to create a self-contained, temporary change in the dairy price support program in response to the problems of milk overproduction and excessive program costs (*id.* at 35a-37a). The court noted that in enacting the 1982 legislation Congress had considered the impact of a deduction program on dairy farmers and also had taken into account most, if not all, of the various factors listed in the Agricultural Act of 1949 for setting a price support for milk (Pet. App. 37a-40a). Since Congress itself had resolved these general price support issues when it created this limited amendment to the dairy price support program, the court of appeals concluded that the Secretary was required by Congress to consider only the factors set out in the 1982 dairy amendments themselves before implementing a deduction program (*id.* at 39a-45a). Thus, the court concluded that the Secretary had considered the relevant factors under the statute and did not err in failing to give weight to largely irrelevant considerations listed in other parts of the Agricultural Act of 1949 (Pet. App. 46a-47a). The court also ruled that the Secretary had not acted improperly by failing to discuss the host of additional considerations raised by petitioners that were nowhere mentioned in the controlling legislation (*id.* at 47a-49a).

Next, the court of appeals held that the Secretary had complied with notice and comment requirements because he provided adequate notice of his proposal and apprised the interested public of the subjects and issues involved (Pet. App. 49a-52a). In addition, the court found that the Secretary had adequately responded to the relevant comments he had received (*id.* at 52a-55a) and had properly explained his reasons for implementing the deduction program (*id.* at 55a-57a).

Finally, the court of appeals concluded that petitioners' constitutional arguments were ripe for resolution and that further delay in the litigation would unnecessarily disrupt the deduction program. The court then rejected petitioners' contentions that the deduction program violated the federal taxing power and the Commerce Clause and was the product of an unconstitutional delegation of legislative authority to the Secretary (Pet. App. 58a-64a).[4]

ARGUMENT

Petitioners broadly contend (Pet. 23-52) that the decision of the court of appeals is inconsistent with the Administrative Procedure Act, the Regulatory Flexibility Act, and the policies and goals of the Agricultural Act of 1949. In fact, however, this case turns solely on the proper interpretation of the 1982 dairy amendments and thus involves a narrow legal issue. Moreover, the proper interpretation of the 1982 dairy amendments is of no continuing significance because Congress superseded the deduction program in Section 102 of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. No. 98-180, 97 Stat. 1128-1135, which establishes a

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[4]Petitioners complain (Pet. 22-23 n.10) that the court of appeals improperly resolved the constitutional issues but they do not seek review of these issues.

significantly different dairy price support system.[5] In any event, the decision below is a correct interpretation of the 1982 dairy amendments and does not conflict with the decision of any other court. Accordingly, it does not warrant review by this Court.

1. Petitioners argue (Pet. 23-32) that the court of appeals erred in holding that the Secretary, in deciding whether to implement a deduction program, was free to disregard factors beyond those set out in the 1982 dairy amendments. According to petitioners, this Court's decisions in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), and *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, No. 82-354 (June 24, 1983), authorize a reviewing court to invalidate agency action based on the court's assessment of factors that are unrelated to the agency's grant of statutory authority. Petitioners' contention is contrary to accepted principles of judicial review of administrative agency rulemaking.

It is true that an agency is required to consider all "relevant factors" (*Overton Park*, 401 U.S. at 416), but what is relevant is defined by the delegation of authority from Congress. Indeed, in *Motor Vehicle Manufacturers Ass'n*, slip op. 12, the Court stated that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider * * *." Thus, a court may not set aside an agency rule that is otherwise valid because of concern for its effect on public policies that Congress did not require the agency to take

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[5]The new Act provides for adjustments in the price support level and creates both a mandatory deduction program and a diversion program providing payments to producers who reduce marketings. 97 Stat. 1128-1130. The Act also states that it is not meant to affect collection of monies due from producers under the deduction program challenged here. 97 Stat. 1129.

into account. See also *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).[6]

In *Overton Park* and *Motor Vehicles Manufacturers Ass'n*, Congress authorized the agencies to consider broad and to some extent conflicting policies in deciding whether to finance construction of a highway (401 U.S. at 405) and to adopt an automobile safety standard (slip op. 2). Thus, the factors relevant to the agency's mission, *as defined by Congress*, were numerous and wide ranging. In this case, as the court below held (Pet. App. 35a-40a), Congress itself studied the problems of milk overproduction and the burgeoning cost of the dairy price support program — the various factors deemed relevant by petitioners. Congress then adopted the narrowly circumscribed deduction in 7 U.S.C. 1446(d). The Secretary was not obliged to reexamine the conclusions drawn by Congress in carrying out his statutory mandate. See *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 50 n.22 (1981). Instead, the Secretary acted reasonably by considering the factors identified as important by Congress in the 1982 dairy amendments themselves.

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[6]Contrary to petitioners' assertion (Pet. 32-38), the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, does not empower a court to reject an agency rule because the court concludes that the rule will have adverse effects on some segments of a regulated industry. Under that Act, " 'the issue before the court will remain whether the rule itself is valid • • •.' " 126 Cong. Rec. S10939 (daily ed. Aug. 6, 1980) (remarks of Sen. Culver) (quoted in *Small Refiners Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983)). Here, Congress evaluated the effect of the Secretary's deduction on small producers, and the Secretary did not " 'completely and *consciously* ignore[ ] the • • • requirement to perform regulatory flexibility analyses,' " see 705 F.2d at 538 (quoting 126 Cong. Rec. S10939 (daily ed. Aug. 6, 1980) (remarks of Sen. Culver)); instead, a regulatory flexibility analysis was performed and the Secretary concluded that the rule still should be adopted (48 Fed. Reg. 11253 (1983)). Thus, there is no basis for finding the rule unreasonable under the Regulatory Flexibility Act.

2. Petitioners argue (Pet. 39-52) that the court of appeals erred in not requiring the Secretary to consider fully all of the policies underlying the milk price support program in the Agricultural Act of 1949 before deciding whether to adopt the 50-cent deduction under the 1982 dairy amendments. In effect, petitioners challenge the holding below that Congress authorized the Secretary to conduct a deduction program as a limited exception to the more general provisions of the milk price support program.

But the court of appeals' decision is fully supported by Congress's use of the phrase "[n]otwithstanding any other provision of law" in the portion of the 1982 dairy amendments that authorized the Secretary to adopt the 50-cent deduction. 7 U.S.C. 1446(d). Petitioners' interpretation, which requires the Secretary to consider virtually every other provision of law, renders that critical phrase meaningless. The language of the statute and its legislative history, which "shows that Congress considered the effects on the economy of imposing the 50-cent deduction, the government budgetary problems and the individualized hardships it would impose on dairy farmers" (Pet. App. 36a),[7] completely undermine petitioners' contention that the Secretary was required to consider factors beyond those mentioned in the 1982 dairy amendments themselves.

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[7]See, *e.g.*, H.R. Rep. 97-687, 97th Cong., 2d Sess. 8 (1982); S. Rep. 97-504, 97th Cong., 2d Sess. 83-84 (1982); 128 Cong. Rec. S10766 (daily ed. Aug. 18, 1982) (remarks of Sen. Proxmire); *id.* at S10767 (remarks of Sen. Domenici); *id.* at S10769-S10770 (remarks of Sen. Dole); *id.* at 10777 (remarks of Sen. Gorton); *id.* at H6362-H6363 (remarks of Rep. Jeffords); 128 Cong. Rec. H6097 (daily ed. Aug. 17, 1982) (remarks of Rep. De La Garza).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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